

**ASSEMBLY BILL**

**No. 436**

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**Introduced by Assembly Member Jones-Sawyer**

February 15, 2013

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An act to amend Section 998 of, and to add Chapter 3.4 (commencing with Section 1000) to Title 14 of Part 2 of, the Code of Civil Procedure, relating to inverse condemnation.

LEGISLATIVE COUNSEL'S DIGEST

AB 436, as introduced, Jones-Sawyer. Inverse condemnation: comparative fault.

(1) Existing law prohibits the taking of private property without the payment of just compensation and permits a person to maintain an action in inverse condemnation for the purpose of obtaining compensation for a taking. Existing law applies the doctrine of comparative fault for the purpose of apportioning responsibility and reducing damages to the extent a plaintiff is found partially at fault.

This bill would apply the doctrine of comparative fault to inverse condemnation actions and would require a court or arbitrator to reduce the compensation paid to a plaintiff in an inverse condemnation proceeding in direct proportion to his or her percentage of fault, if any, in the damaging of property that constitutes a taking.

(2) Existing law governs offers by a party to compromise a dispute that is to be resolved by trial or arbitration. Existing law provides in this regard, among other things, that if the defendant makes an offer that the plaintiff does not accept, and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff is prohibited from recovering his or her postoffer costs and is required to pay the defendant's costs from the time of the offer.

Existing law also awards to the plaintiff in an inverse condemnation proceeding reasonable costs actually incurred because of that proceeding in the trial court, or in any appellate proceeding, in which the plaintiff prevails on any issue in that proceeding.

This bill would provide, notwithstanding the latter provision, that if the defendant in an inverse condemnation action, on or after January 1, 2014, makes an offer that the plaintiff does not accept, and the plaintiff fails to obtain a judgment or award, the plaintiff shall not recover his or her postoffer costs and shall pay the defendant's postoffer costs. Additionally, the bill would provide that the plaintiff may be required to pay the defendant's costs for expert witnesses. Alternatively, if the plaintiff rejects the offer and fails to obtain a more favorable judgment or award, the bill would prohibit the plaintiff from recovering his or her postoffer costs, but would provide that the plaintiff shall not be ordered to pay the defendant's postoffer costs.

Vote: majority. Appropriation: no. Fiscal committee: no.  
State-mandated local program: no.

*The people of the State of California do enact as follows:*

- 1 SECTION 1. Section 998 of the Code of Civil Procedure is
- 2 amended to read:
- 3 998. (a) The costs allowed under Sections 1031 and 1032 shall
- 4 be withheld or augmented as provided in this section.
- 5 (b) Not less than 10 days prior to commencement of trial or
- 6 arbitration (as provided in Section 1281 or 1295) of a dispute to
- 7 be resolved by arbitration, any party may serve an offer in writing
- 8 upon any other party to the action to allow judgment to be taken
- 9 or an award to be entered in accordance with the terms and
- 10 conditions stated at that time. The written offer shall include a
- 11 statement of the offer, containing the terms and conditions of the
- 12 judgment or award, and a provision that allows the accepting party
- 13 to indicate acceptance of the offer by signing a statement that the
- 14 offer is accepted. Any acceptance of the offer, whether made on
- 15 the document containing the offer or on a separate document of
- 16 acceptance, shall be in writing and shall be signed by counsel for
- 17 the accepting party or, if not represented by counsel, by the
- 18 accepting party.
- 19 (1) If the offer is accepted, the offer with proof of acceptance
- 20 shall be filed and the clerk or the judge shall enter judgment

1 accordingly. In the case of an arbitration, the offer with proof of  
2 acceptance shall be filed with the arbitrator or arbitrators who shall  
3 promptly render an award accordingly.

4 (2) If the offer is not accepted prior to trial or arbitration or  
5 within 30 days after it is made, whichever occurs first, it shall be  
6 deemed withdrawn, and cannot be given in evidence upon the trial  
7 or arbitration.

8 (3) For purposes of this subdivision, a trial or arbitration shall  
9 be deemed to be actually commenced at the beginning of the  
10 opening statement of the plaintiff or counsel, and if there is no  
11 opening statement, then at the time of the administering of the oath  
12 or affirmation to the first witness, or the introduction of any  
13 evidence.

14 (c) (1) If an offer made by a defendant is not accepted and the  
15 plaintiff fails to obtain a more favorable judgment or award, the  
16 plaintiff shall not recover his or her postoffer costs and shall pay  
17 the defendant's costs from the time of the offer. In addition, in any  
18 action or proceeding other than an eminent domain action, the  
19 court or arbitrator, in its discretion, may require the plaintiff to  
20 pay a reasonable sum to cover costs of the services of expert  
21 witnesses, who are not regular employees of any party, actually  
22 incurred and reasonably necessary in either, or both, preparation  
23 for trial or arbitration, or during trial or arbitration, of the case by  
24 the defendant.

25 (2) (A) In determining whether the plaintiff obtains a more  
26 favorable judgment, the court or arbitrator shall exclude the  
27 postoffer costs.

28 (B) It is the intent of the Legislature in enacting subparagraph  
29 (A) to supersede the holding in *Encinitas Plaza Real v. Knight*,  
30 209 Cal.App.3d 996, that attorney's fees awarded to the prevailing  
31 party were not costs for purposes of this section but were part of  
32 the judgment.

33 (d) If an offer made by a plaintiff is not accepted and the  
34 defendant fails to obtain a more favorable judgment or award in  
35 any action or proceeding other than an eminent domain action, the  
36 court or arbitrator, in its discretion, may require the defendant to  
37 pay a reasonable sum to cover postoffer costs of the services of  
38 expert witnesses, who are not regular employees of any party,  
39 actually incurred and reasonably necessary in either, or both,

1 preparation for trial or arbitration, or during trial or arbitration, of  
2 the case by the plaintiff, in addition to plaintiff's costs.

3 (e) If an offer made by a defendant is not accepted and the  
4 plaintiff fails to obtain a more favorable judgment or award, the  
5 costs under this section, from the time of the offer, shall be  
6 deducted from any damages awarded in favor of the plaintiff. If  
7 the costs awarded under this section exceed the amount of the  
8 damages awarded to the plaintiff the net amount shall be awarded  
9 to the defendant and judgment or award shall be entered  
10 accordingly.

11 (f) Police officers shall be deemed to be expert witnesses for  
12 the purposes of this section. For purposes of this section, "plaintiff"  
13 includes a cross-complainant and "defendant" includes a  
14 cross-defendant. Any judgment or award entered pursuant to this  
15 section shall be deemed to be a compromise settlement.

16 (g) (1) *Notwithstanding Section 1036 or any other law, the*  
17 *following shall apply to an action in inverse condemnation:*

18 (A) *If an offer made by a defendant is not accepted and the*  
19 *plaintiff fails to obtain a judgment or award, the plaintiff shall not*  
20 *recover his or her postoffer costs and shall pay the defendant's*  
21 *costs from the time of the offer. In addition, the court or arbitrator,*  
22 *in its discretion, may require the plaintiff to pay a reasonable sum*  
23 *to cover costs of the services of expert witnesses, who are not*  
24 *regular employees of any party, actually incurred and reasonably*  
25 *necessary in either, or both, preparation for trial or arbitration,*  
26 *or during trial or arbitration, of the case by the defendant.*

27 (B) *If an offer made by a defendant is not accepted and the*  
28 *plaintiff fails to obtain a more favorable judgment or award, the*  
29 *plaintiff shall not recover his or her postoffer costs. The court or*  
30 *arbitrator shall not order the plaintiff to pay the defendant's costs*  
31 *from the time of the offer. In determining whether the plaintiff*  
32 *obtains a more favorable judgment, the court or arbitrator shall*  
33 *exclude the postoffer costs.*

34 (2) *This subdivision shall apply only to offers in inverse*  
35 *condemnation actions that are made on or after January 1, 2014.*

36 ~~(g)~~

37 (h) This chapter does not apply to either of the following:

38 (1) An offer that is made by a plaintiff in an eminent domain  
39 action.

1 (2) Any enforcement action brought in the name of the people  
2 of the State of California by the Attorney General, a district  
3 attorney, or a city attorney, acting as a public prosecutor.

4 ~~(h)~~

5 (i) The costs for services of expert witnesses for trial under  
6 subdivisions (c) and (d) shall not exceed those specified in Section  
7 68092.5 of the Government Code.

8 ~~(i)~~

9 (j) This section shall not apply to labor arbitrations filed pursuant  
10 to memoranda of understanding under the Ralph C. Dills Act  
11 (Chapter 10.3 (commencing with Section 3512) of Division 4 of  
12 Title 1 of the Government Code).

13 SEC. 2. Chapter 3.4 (commencing with Section 1000) is added  
14 to Title 14 of Part 2 of the Code of Civil Procedure, to read:

15  
16 CHAPTER 3.4. COMPARATIVE FAULT IN INVERSE  
17 CONDEMNATION  
18

19 1000. (a) As described in this chapter, the doctrine of  
20 comparative fault applies to actions in inverse condemnation.

21 (b) In an inverse condemnation proceeding, a court or arbitrator  
22 shall reduce the compensation to be paid to a plaintiff in direct  
23 proportion to his or her percentage of fault, if any, in the damaging  
24 of property that constitutes a taking for a public use.